UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14

SYSCO KANSAS CITY, INC. Employer, and TEAMSTERS LOCAL 41, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, Petitioner.	)	Case No. 14-RC-136240

PETITIONER'S STATEMENT IN OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW OF A DECISION AND DIRECTION OF ELECTION

COMES NOW Petitioner, Teamsters Local 41, Affiliated with the International Brotherhood of Teamsters, ("the Union" or "Petitioner"), by and through its attorney of record, to submit the following Statement in Opposition to Employer's Request for Review of Decision and Direction of Election in connection with the above-captioned case pursuant to Section 102.67(e) of the NLRB Rules and Regulations.

I. INTRODUCTION & BACKGROUND

The Employer, Sysco Kansas City, Inc. (hereinafter "the Employer" or "Sysco") distributes food service products from the Employer's facility in Olathe, Kansas (the "Olathe Facility"). Petitioner filed an election petition on September 8, 2014 to represent a unit of all full-time and regular part-time city drivers and helpers employed by the Employer from its Olathe Facility, but excluding all country drivers, office clerical employees, professional

employees, managers, guards and supervisors as defined in the Act, and all other employees. (Bd. Ex. 2).

The Employer was given the opportunity to stipulate to the petitioned-for unit, but instead argued for a unit of all non-supervisory transportation department employees. (Tr. 11, 15). This would have included city drivers, country drivers, shuttle drivers, domicile drivers, helpers, fleet mechanics, and equipment handlers (including hostlers, fuelers, and yard spotters). (Tr. 267–68).[1]

On October 3, 2014, Regional Director Daniel L. Hubbel (the "Regional Director") issued a Decision and Direction of Election (the "Decision").[2] In the Decision, the Regional Director found that the petitioned-for unit was an appropriate unit. (Decision 17). Accordingly, the Regional Director directed an election of the petitioned-for unit. (Decision 17–18).

On October 17, 2014, the Employer filed its Request for Review. For the reasons stated herein, the Board should deny the Request for Review as it raises no substantial issues warranting review.

II. APPLICABLE STANDARD: REQUEST FOR REVIEW

Under Section 102.67(c), "[t]he Board will grant a request for review only where *compelling reasons* exist." Accordingly, a request for review may be granted only upon one or

[1] As a brief introduction, **city drivers** are based out of the Employer's Olathe facility. **Country drivers** are based out of the Olathe facility, but many factors distinguish them from city drivers, such as different compensation, different geographic routes, different hours of work, lack of interchange, lack of contact, etc. **Domicile drivers** are based out of different facilities, and the same factors that distinguish city drivers from country drivers also distinguish city drivers from domicile drivers. **Shuttle drivers** do not drive routes, are based out of different facilities, and are also distinguished by the same factors that distinguish city drivers from country drivers and domicile drivers.

Additionally, the Employer asserted at hearing that yard spotters are the same as equipment handlers. (Tr. 71, 98–99). The Employer's organization chart, however, lists yard spotters as a separate position in a separate department with separate supervision. (Er. Ex. 1).

[2] Inadvertent omissions from the Decision and Direction of Election made it appear as though Officer-In-Charge Naomi L. Stuart issued the decision. The Regional Director issued an Erratum to Decision and Direction of Election on October 21, 2014 correcting this error.

more of the following grounds:

> (1) That a substantial question of law or policy is raised because of
> (i) the absence of, or
> (ii) a departure from, officially reported Board precedent.
> (2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
> (3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
> (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

Section 102.67(c), Board Rules and Regulations.

III. ARGUMENT: THE REQUEST FOR REVIEW SHOULD BE DENIED

A. The Decision was not invalid.

On October 21, 2014, the Regional Director issued an Erratum to Decision and Direction of Election (the "Erratum"). As the Erratum explains, "Inadvertently omitted from the signature line on page 21 of the DDE were two lines giving the name and title of the Regional Director and the word 'by' immediately before the signature line signed by Officer-in-Charge Naomi L. Stuart." The Erratum corrected the Decision to reflect its issuance by the Regional Director. Thus, the Employer's argument that the Decision was invalid because it was issued by an Officer-in-Charge, rather than a Regional Director, is inapposite.

Additionally, it is not improper for an Officer-in-Charge to issue a Decision & Direction of Election. The Board's Rules and Regulations authorize the Regional Director to determine whether a unit is appropriate and issue a direction of election following a hearing. *See* Sec. 102.67(a). However, the Board's Rules and Regulations also provide:

> *The term "Regional Director" as used herein* shall mean the agent designated by the Board as the Regional Director for a particular Region, and *shall also include any agent designated by the Board as officer-in-charge of a subregional office,* but the officer-in-charge shall have only such powers, duties, and functions appertaining to Regional Directors as shall have been duly delegated to such officer-in-charge.

Sec. 102.5 (emphasis added). Thus, an Officer-in-Charge has the same authority as a Regional Director to determine whether a unit is appropriate and issue a direction of election, so long as the Regional Director has delegated that duty to the Officer-in-Charge.

B. The Decision does not contain factual errors which are the basis for the decision and which prejudicially affect the Employer.

Although not clearly stated in the Request for Review, it appears that the Employer only asserts that the Decision contains one factual error. In the Decision, the Regional Director concluded that the petitioned-for unit was readily identifiable as a group. (Decision 3). The Regional Director based this conclusion on numerous factors.[3] (Decision 12). The Employer argues that one of these factors was a "conclusion that 'city driver' is recognized as a separate job classification by Sysco," although the Employer does not cite to a location in the Decision that reaches this purported conclusion. (RFR 8). The Employer argues that this conclusion was erroneous because Sysco does not have a job classification of city drivers. (RFR 8).

The Decision, however, explicitly acknowledges the Employer's claim that it does not have a formal job classification of city drivers. Nonetheless, the Regional Director determined that the evidence shows city drivers *function* as a different classification based on the Employer's manner of operation:

> *Although the Employer asserts that it does not separate its "route drivers" into separate job classifications,* the record evidence establishes that the Employer classifies its route drivers as city drivers, country drivers, and domicile drivers.
> . . .
> The record set forth at the hearing established that the Employer operates its business in a manner that clearly defines and differentiates between its different classification of drivers and the work functions that they perform.

[3] In addition to the allegedly erroneous factor of a separate classification for city drivers, the Regional Director also found that city drivers were readily-identifiable as a group by the "type of driving route they are assigned and geographical area in which they work, a separate seniority list, a separate city driver work schedule, and a distinct compensation scheme." (Decision 12).

(Decision 5–6, 11) (emphasis added).

In light of the Decision's explicit recognition of the Employer's assertion that city drivers are not a formal job classification, the Regional Director's decision on a factual issue was not clearly erroneous.

Further, assuming *arguendo* that there was a factual error, the Employer failed to demonstrate that its rights were prejudicially affected by the error as required by Section 102.67(c). Factors for determining whether a unit is "readily identifiable as a group" include "job classifications, departments, functions, work locations, skills, or similar factors." *Specialty Healthcare*, 357 NLRB No. 83, *17. Here, as the Decision explained, city drivers are readily identifiable by the "type of driving route they are assigned and geographical area in which they work, a separate seniority list, a separate city driver work schedule, and a distinct compensation scheme." (Decision 12). Additionally, the city drivers and driver helpers were a bargaining unit from1975 until May 2008. (Decision 12). Thus, there were sufficient grounds to conclude that the city drivers were readily identifiable as a group even without considering the allegedly erroneous conclusion regarding the city driver job classification.

In sum, the Decision did not contain a clearly erroneous decision on a factual issue, and even if the Decision did make the error which the Employer alleges, the Employer failed to demonstrate that its rights were prejudicially affected.

C. The Director's conclusion that petitioned-for unit is appropriate was not a departure from precedent.

i. The City Drivers and Helpers share a community of interest.

The Employer seems to argue that the petitioned-for unit is inappropriate due to the inclusion of helpers, although the basis for this argument is unclear from the Request for Review. (RFR 9). The Employer does not cite any authority establishing the standard for determining the

appropriateness of including helpers in the unit. Nor does the Employer cite any Board precedent where a petitioned-for unit was found inappropriate on similar facts. Instead, the Employer simply states that the Decision included helpers in the unit "despite the other drivers' [sic] having a much stronger community of interest with the city drivers." (RFR 9). This is not accurate, nor is it the correct standard under Board precedent.[4] The Decision found that city drivers and helpers share a community of interest. (Decision 12). Even if it were true that city drivers shared a stronger community interest with other drivers than with helpers, which it is not, this would not satisfy the Employer's burden.

Further, the asserted differences between the city drivers and the helpers are not sufficient to show that they do not have a community of interest. The Decision cited numerous factors demonstrating a community of interest between city drivers and helpers, including daily interaction, working together on routes, the same supervision, the same benefits, and bargaining history. (Decision 12). There is no evidence in the record to support the Employer's assertion that helpers are not paid in the same manner as city drivers. (RFR 9). The Decision recognized that the helpers do not have CDLs, but observed that "the record establishes daily interaction between city drivers and helpers in that while awaiting the appropriate license," and that "driver helpers are generally in their positions a limited period of time until they are qualified to become city drivers." (Decision 12). The Employer's own testimony at hearing also showed that the Employer does not consider helpers to be a separate group:

> Q: We had some testimony or evidence about the trainees are -- what about helpers? What are helpers?
> A: We really don't have helpers. I mean, we -- they're driver trainees. I think

[4] "[T]he Board looks first to the unit sought by the petitioner, and if it is an appropriate unit, the Board's inquiry ends." *Specialty Healthcare*, 357 NLRB No. 83, *12. The petitioner need only demonstrate a community of interest among the petitioned-for unit, while the Employer must demonstrate an *overwhelming* community of interest to include employees outside the petitioned-for unit. *See id.* at 17. Thus, the burden for including helpers in the unit is lower than the burden of including drivers who were not included in the petitioned-for unit.

> they're just -- they're just driver trainees, we're trying to help them get their license.

(Tr. 86). In light of these factors, the Employer failed to demonstrate that the Decision departed from Board precedent or raised a substantial question of law or policy.

ii. The City Drivers and Country Drivers do not share an overwhelming community of interest.

The Employer acknowledges that the *Speciality Healthcare* "overwhelming community of interest" standard is the correct standard of analysis. Specifically, the Employer must demonstrate that the proposed unit, consisting of employees readily identifiable as a group who share a community of interest, is nevertheless *not* appropriate because the smallest suitable unit should contain additional employees who share an "overwhelming community of interest" with those in the petitioned-for unit. *Specialty Healthcare*, 357 NLRB at *15.

Two groups share an "overwhelming community of interest" when their community of interest factors "overlap almost completely." *Guide Dogs for the Blind, Inc.*, 359 NLRB No. 151, *8 (2013) (citing *Specialty Healthcare*). Further, because a proposed unit need only be an appropriate unit and need not be the only or the most appropriate unit, "it follows inescapably that demonstrating that another unit containing the employees in the proposed unit plus others is appropriate, or even that it is more appropriate, is not sufficient to demonstrate that the proposed unit is inappropriate." *Specialty Healthcare*, 357 NLRB at *15.

As a result, the evidentiary standard the Employer must meet is high. "[I]t must 'show that the Board's unit is clearly inappropriate.'" *Id.* (*quoting* *Dunbar Armored, Inc. v. NLRB*, 186 F.3d 844, 847 (7th Cir. 1999); *NLRB v. Aaron's Office Furniture*, 825 F.2d 1167, 1169 (7th Cir. 1987)).

There are numerous inaccurate and/or misleading factors in the Employer's community of interest chart, in which it asserts that nineteen factors are "[e]xactly the same" for city drivers and country drivers. The Employer also ignores or downplays the significance of the Decision's reliance on numerous factors showing differences between the city drivers and country drivers.

Pay

The Employer takes contradictory positions regarding whether city and country drivers receive the same pay. In its community of interest table, the Employer first asserts that city and country drivers receive "[e]xactly the same" pay. (RFR 10). Subsequently, the Employer admits that "city drivers are paid on mileage bands which provide slightly more pay per mile than the country drivers." (RFR 13).

As an initial matter, the Employer does not cite any evidence in the record to support its assertion that the mileage bands only provide "slightly" more pay for city drivers. At hearing, the Employer repeatedly acknowledged that the mileage bands were different. (Tr. 116–17, 120). The Employer failed to introduce evidence at hearing or to argue in its post-hearing brief that the admitted difference was de minimis.

Second, the different mileage bands were not the only difference in compensation between the city drivers and country drivers on which the Decision relied. As the Regional Director explained:

> Country drivers are eligible for additional pay contingent upon driving an overnight route. With an overnight country route, country drivers receive a flat per diem of $85 or alternatively, their hotel bill is paid by the Employer and the drivers receive $30 for food.

(Decision 15).

In sum, the Employer admits that its claim that city drivers and country drivers receive exactly the same pay is false. Furthermore, not only is there no evidence to support the

Employer's attempt to diminish the significance of the mileage bands, but the Decision also relied on additional differences that the Employer did not address in its Request for Review.

Equipment & How Delivered

Some of the factors in the Employer's community of interest table appear to overlap. Specifically, the fourth entry (Equipment: Sysco truck tractors and trailers) appears to be the same factor as the eighth entry (How Delivered: Sysco delivery trucks). (RFR 10–11).

Additionally, the record does not support the assertion that city drivers and country drivers use "[e]xactly the same equipment." For example, the Employer admitted at hearing that tandem tractors are primarily used by country drivers, rather than city drivers. (Tr. 131–32).

Work & Safety Rules

The Employer's testimony and documentary evidence introduced at hearing demonstrate that the work and safety rules that apply to city and country drivers are not "[e]xactly the same," as the Employer alleges. (RFR 11). The Employer admitted at hearing that different Department of Transportation rules can apply to city drivers and country drivers. (Tr. 182–83). Additionally, the Union introduced documentary evidence of separate company procedures that apply to the city drivers, such as the Second Truck Procedure for City Drivers. (U. Ex. 2). In light of this, the Employer's assertion that "[e]xactly the same" safety rules apply is not supported by the record.

Locker Facilities & Break Areas

The Employer's testimony at hearing shows that the contact between city drivers and country drivers as a result of sharing a locker room and break room is extremely limited. When asked about the locker rooms, the Employer's Vice President, Larry Waters stated, "I don't know that a lot of drivers even use the locker rooms, the lockers. They take their clothes home and then

put them in the dirty laundry when they're done or they do it themselves." (Tr. 91–92). Similarly, Mr. Waters testified at hearing regarding the break room:

> Q: Do route drivers ever take any type of meal or break periods while at the Olathe OpCo?
> A: Not very often, no.
> Q: Are there any break areas to which drivers would be assigned?
> A: We do have a break -- where they gather in the morning is like, it's a driver room, break area, and then we have one in the shop also. But normally the drivers are out on the route during breaks and lunch or something.

(Tr. 91).

The different hours of work for city drivers and country drivers also indicates that even when a city driver or country driver uses the locker room or break room, they are unlikely to come into contact with a different category of driver. Furthermore, the record does not contain any other references to contact between city and country drivers. In light of this, the limited contact between city and country drivers weighs against a finding of an overwhelming community of interest.

Personnel Records & Pay Records

The Employer does not cite any Board precedent holding that the location where the Employer stores personnel records and pay records is relevant to the community of interest analysis. Even if it were appropriate to consider where employee records are stored, the Employer does not provide any explanation for why "Personnel Records" and "Pay Records" should be weighed as two separate factors rather than one.

Hours of Work

The Decision concluded that "country drivers are primarily scheduled to depart the Employer's facility well in advance of the time that city drivers are scheduled to arrive at the Olathe facility." (Decision 14). The Employer argues that this is inaccurate based on Pages 1

and 5 of Employer's Exhibit 2, which both show work schedules for the week of September 21, 2014 through September 27, 2014. (RFR 12). The Petitioner notes that there is no evidence to indicate that this particular week, which was cherry-picked by the employer, is representative of a typical week. Nonetheless, on Page 1 of Employer's Exhibit 2, 83 of the 102 start times (81 percent) assigned to country drivers are at 4:30 AM or earlier. On Page 5 of Employer's Exhibit 2, 128 of the 155 weekday start times (83 percent) for city drivers who are not in training are at 5:30 AM or later. The Regional Director's determination that country drivers are "primarily scheduled" well in advance of the city drivers is supported by the record, even using the one week cherry-picked by the Employer to advance its argument.

The Decision also relied on the fact that city drivers and country drivers are assigned to different kinds of shifts. As stated in the Decision, "[c]ertain country driver routes involve an overnight stay, while city driver routes do not." (Decision 15). The Employer also acknowledged at hearing that city drivers also have Saturday shifts, while country drivers do not. (Tr. 146–47).

Separate Meetings

An employer holding separate meetings for different groups of employees is also a factor that indicates a lack of a community of interest. *See Liquid Transporters, Inc.*, 250 NLRB 1421, 1424 (1980). The Decision concluded that "[b]ecause of the differences in work schedules of city and country drivers, the Employer generally conducts separate employee meetings for city drivers and country drivers." (Decision 14). The Employer acknowledged that this was true at hearing and in its Request for Review. (Tr. 151–52; RFR 12).

Separate Seniority Lists

The Board has held that groups of employees having separate seniority lists is indicative of a lack of a community of interest between the groups. *See Liquid Transporters, Inc.*, 250 NLRB at 1424; *Daniel Construction Co.*, 244 NLRB 704, 723 n.45. The Decision concluded that "[c]ity and country drivers are also considered distinct and separate for the purpose of seniority." (Decision 15). The Employer acknowledged that this was true in its Request for Review. (RFR 13).

Lack of Interchange

The Decision concluded that the Employer "failed to establish that significant interchange exists between city and country drivers." (Decision 13). This conclusion is well-supported by the Decision and the record.

As an initial matter, the Request for Review claims that Employer's Exhibit 5, which consists of an Employer-selected group of daily driver logs from the Employer-selected time period of May 2, 2014 to September 11, 2014, shows *thirty-four* examples of interchange. In actuality, there were only *twenty-nine* indications of interchange.[5]

As the Decision explained, the Employer's evidence "lacks substantial persuasive value as the Employer failed to place its examples of interchange into context to establish that substantial interchange occurs, rather than isolated instances of interchange." (Decision 14). According to the Union's calculations in its post-hearing brief, which the Decision referred to and which the Employer does not dispute in its Request for Review, interchange in a time period that was cherry-picked by the employer "appears to involve less than 1% of routes driven during the given time period." (Decision 14). Additionally, "a substantial number of the 29 examples

[5] While there are thirty-four pages of paper in Employer's Exhibit 5, there are only twenty-nine driver logs; five of the logs continued on to a second page.

of interchange appear to involve a single driver who volunteered to exchange routes on numerous occasions." (Decision 14). As the Decision notes, "[t]he Board places less weight on incidents of voluntary interchange. (Decision 14, citing *Red Lobster*, 300 NLRB 908, 911 (1990)). In light of this, the Regional Director's conclusion that the Employer's evidence of interchange lacked persuasive value was well-supported by the record and Board precedent.

The Employer also argues that mechanics "have been used as delivery drivers when necessary." (RFR 17). Again, there is insufficient evidence in the record to support a finding of substantial interchange. At hearing, there was testimony that two individuals in Fleet Maintenance drove routes in the summer when the Employer was short on drivers. (Tr. 85–86). There is no evidence, however, indicating whether this was a single, isolated incident or whether it occurred regularly. Furthermore, one of the two individuals—Jerry Steele—is a supervisor, and would not be included in the expanded unit the Employer proposes. (Tr. 85–86).

Different Geographical Routes

The Board has held that it can be appropriate to have separate units of drivers where those drivers "work on routes in locations that are geographically distinct from each other." *Canal Carting, Inc.*, 339 NLRB 969, 970 (2003). The Decision concluded that "city drivers and country drivers have different types of routes, with country drivers assigned routes extending up to 200 miles outside the Greater Kansas City area while city drivers remain within the Kansas City metro area." (Decision 15). The Employer acknowledges that this is true in its Request for Review. (RFR 14).

Lack of Functional Integration

The Decision concluded there was little functional integration between the city drivers and country drivers. As the Decision explained, "city and country drivers do not possess an

operational nexus with each other when it comes to the function of the Employer's business, and each performs within a separate geographic area without their work being functionally connected." (Decision 15). This finding is consistent with Board precedent, and the Employer does not provide any authority indicating otherwise. *See, e.g., DTG Operations, Inc.*, 357 NLRB No. 175 (2011) (no functional integration where employees have "separate role[s] in the process" of renting cars).

Bargaining History

As the Decision recognizes, "where a bargaining history exists the Board has been clear that bargaining history is a relevant and substantial factor in the community of interest analysis." (Decision 12) (citing *Canal Carting, Inc.*, 339 NLRB 969 (2003); *Ready Mix USA, Inc.*, 340 NLRB 946 (2003)). As the Decision notes, "from 1975 until May 2008, the Employer's city drivers and driver helpers were included in a separate collective bargaining unit." (Decision 12). The Employer has not provided evidence of any circumstances that have changed since May 2008 that would make this historical unit no longer appropriate. Thus, this factor also weighs in favor of a separate unit for city drivers.

* * *

The Employer claims that the Decision "seized upon five supposed differences and decided that those factors trump the other similar factors and found there is not an overwhelmingly [sic] community of interest between the city and country drivers." (RFR 13). This assertion is completely inaccurate in light of the above discussion.

The Employer leaves out numerous differences on which the Decision relied: lack of interchange, different geographical routes, lack of functional integration, and bargaining history. The Employer also overstates its own case: the pay, equipment, and work and safety rule factors

all have differences that the Employer ignores. The Employer also attempts to count the same facts, such as what equipment the drivers use and how drivers make deliveries, as separate factors. The Employer provides no authority indicating that the location an Employer keeps personnel records and payroll records is relevant for the community of interest analysis. Other factors, such as common break areas and locker facilities, are insufficient to show significant contact between city and country drivers.

After accounting for these factors, it is clear that the Employer's characterization of the Decision and its rationale is incomplete and inaccurate. The Director's conclusion that country drivers do not share an overwhelming community of interest with the city drivers was not a departure from Board precedent.

iii. The City Drivers and other transportation department employees do not share an overwhelming community of interest.

The Employer does not appear to argue that city drivers share an overwhelming community of interest with the remaining transportation department employees. Rather, the Employer declares that it demonstrated city drivers and country drivers have an overwhelming community of interest, and therefore it only needs to satisfy the typical community of interest standard to show that the other transportation department employees must be included in the unit. (RFR 15). This assertion is not supported by *Specialty Healthcare*. The Employer must argue that the transportation department employees share an overwhelming community of interest with the city drivers. It has failed to do so.

Given the Employer's failure to argue that city drivers and other transportation department employees share an overwhelming community of interest, there is no need for Petitioner to argue otherwise. Nonetheless, the Decision provides a clear explanation of why

there is not an overwhelming community of interest between the city drivers and other transportation department employees.

As the Decision explains, there is little to no evidence of interchange or interaction between the city drivers and the other drivers. (Decision 16). Domicile drivers are based out of different facilities. *Id.* There is no functional integration. *Id.* Domicile drivers and shuttle drivers have separate compensation scheme and seniority list. *Id.* The record also provides support for other differences, such as distinct work duties. (Tr. 23, 27, 133).

There are even more differences between city drivers and fleet mechanics/equipment handlers. Work functions are completely different and performed in different locations. (Decision 16–17). Hours of work are different and there is limited interaction. (Decision 17). There is no evidence of interchange. *Id.* There is different compensation and separate supervision. *Id.*

In sum, the Employer fails to argue that there is an overwhelming community of interest between city drivers and other transportation department employees. Even overlooking this failure, the Decision's conclusion that there is no overwhelming community of interest was not a departure from Board precedent.

D. There are no compelling reasons to reconsider *Specialty Healthcare*.

It appears that the only argument the Employer advances is that the Decision "has set a definition of 'overwhelming' so high that it will be impossible for any party opposing a petitioned-for unit to meet [the] definition and standard."

It is true that not every difference between a group of employees is sufficient to support a distinct unit. The Board recognized this in *Specialty Healthcare*, noting that a proposed unit consisting of "only CNAs working on the night shift or only CNAs working on the first floor of

the facility" might be a fractured unit. 357 NLRB No. 83, *18. "In other words, no two employees' terms and conditions of employment are identical, yet some distinctions are too slight or too insignificant to provide a rational basis for a unit's boundaries." *Id.*

The "overwhelming community of interest" standard adopted by *Specialty Healthcare* was enforced by the Sixth Circuit Court of Appeals[6] and has been repeatedly applied by the Board.[7] The definition of "overwhelming" as applied in this case does not change the potentially fractured nature of the hypothetical units of night shift CNAs or first floor CNAs in *Specialty Healthcare*. There is not only one factor, such as the shift or the floor on which the employees work, that separates the petitioned-for unit from the larger unit sought by the Employer. Rather, the Decision found that there were numerous significant differences between the petitioned-for unit and the other groups of employees the Employer sought to include in the unit. The definition of "overwhelming" used here leaves ample room for an Employer to successfully dispute a petitioned-for unit in circumstances where there are fewer significant differences than in the instant case.

The Employer fails to demonstrate any compelling reasons to reconsider this standard.

IV. CONCLUSION

"The Board will grant a request for review only where compelling reasons exist." Section 102.67(c), NLRB Rules and Regulations. The Employer has completely failed to put forth any compelling reason sufficient to meet this standard.

The Employer's argument that the Decision was invalid is inapposite because the Decision was issued by the Regional Director. The Decision did not contain a clearly erroneous

[6] *See Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013).
[7] *See, e.g.*, *Guide Dogs For the Blind, Inc.*, 359 NLRB No. 151 (2013); *Fraser Engineering Company, Inc.*, 359 NLRB No. 80 (2013); *DTG Operations, Inc.*, 357 NLRB No. 175 (2011); *Northrup Gruman*, 357 NLRB No. 163 (2011).

decision on a factual issue, and even if the Decision did make the error which the Employer alleges, the Employer failed to demonstrate that its rights were prejudicially affected. The conclusion that petitioned-for unit was appropriate was not a departure from precedent, and the Employer's arguments otherwise are based on an incomplete and inaccurate representation of the Decision and the record, and are not supported by Board authority. The Employer also presents no compelling reasons to reconsider *Specialty Healthcare*.

For the foregoing reasons, the Request for Review should be rejected and denied as it raises no substantial issues warranting review.

Date: October 24, 2014

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2014, I electronically filed Petitioner's Statement in Opposition to Employer's Request for Review of Decision and Direction of Election via the NLRB's e-filing system and forwarded a copy by email and to the following:

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